

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal between the
Owners of the Screw Steam-ship or Vessel 'Esk'
and the Owners of the Steam-ship 'Niord,' from
the High Court of Admiralty; delivered 29th of
November, 1870.*

Present:—

SIR JAMES W. COLVILLE.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

THE collision which has given rise to the suit and cross-suit which are now brought on appeal before their Lordships took place in that portion of the river Thames which is known as the Halfway Reach on the 12th of November 1869, about half-past nine on that morning. The screw steamer 'Esk,' a collier in ballast, was proceeding down the river, and the 'Niord,' a Swedish screw steamer laden with a crop of oats, was coming up the river. Near the place of collision is a not very well defined point on the southern or Kentish side of the river, which divides the Halfway Reach from the Barking Reach. The vessels appear to have first sighted each other across this point, whilst the 'Esk' was coming down the Barking Reach; and as they approached each other, the 'Niord,' which was in charge of a licensed pilot first ported her helm and then put it hard a-port until she had paid off about five points. The 'Esk,' on the other hand, upon seeing this manœuvre of the 'Niord,' stopped and reversed her engines, and put her helm hard a-starboard. The result was a collision, the 'Esk' running almost at a right angle into the 'Niord,' nearly amidships, cutting clean into her boiler, and compelling her, in order to avoid sinking in deep water, to run ashore on the northern side of the river.

These facts seem to be undisputed. The evidence as to the precise time at which the manœuvres were executed, the circumstances which preceded them, and the relative positions of the vessels when the 'Esk' first rounded the point, is conflicting, and in many respects even more loose and unsatisfactory than nautical evidence in cases of collision almost proverbially is. Upon that evidence, however, the learned Judge of the Admiralty Court, assisted by two Elder Brethren of the Trinity House, came to the conclusion that the 'Esk' was solely in fault; and upon the principles which uniformly guide this Board, and which are more particularly laid down and enforced in the case of the 'Julia,' in the 14th volume of Moore's Reports, it will be their Lordships' duty to affirm that decision upon questions of fact, unless they are clearly satisfied that it is erroneous.

Before, however, they proceed to consider the effect of the evidence and of the arguments which have been founded upon it, their Lordships deem it right to make a few observations upon the case of the 'Velocity,' which was cited by the learned Judge of the Admiralty Court in his judgment, and has also been cited at the bar, in order to remove any possible misapprehension which may exist concerning its effect.

In that case the Admiralty Court had held that the case was one which fell within the 14th of the Steering and Sailing Rules; that the two steamers in question were crossing each other; that it was the duty of the 'Velocity' to keep her course, and the duty of the other vessel (the 'Carbon') to get out of the way; that the 'Carbon' by porting her helm, which brought her across the river, had executed the manœuvre which the performance of her duty required; and that the 'Velocity' had failed to keep her course and was, therefore, solely in fault. The Appellate Court, on the other hand, held that the case was not one of two vessels crossing within the meaning of the 18th Rule; that the course of the 'Velocity' was, after rounding the Millwall Pier, to run down the river on the north shore; that the 'Carbon' was not justified in assuming that the 'Velocity' was crossing the river, but should have pursued her own course on the south of the mid channel, in

which case the two vessels would have passed free starboard to starboard. It held further that if the case was one within the 18th Rule, the 'Carbon' was still to blame, inasmuch as she had not got out of the way of the 'Velocity' which had "kept her course;" their Lordships holding that according to the true interpretation of the term "keeping her course" she was at liberty to hold on upon the course which she would have pursued, had no vessel been in sight, and was not bound to follow the direction in which her head, as she rounded the point, happened to be at the moment when she was first sighted. In the course of the argument, however, it had been brought to their Lordships' notice that whilst the Merchant Shipping Act of 1854 was in force, the 'Velocity' would under its provisions have been bound to keep on the south side of the mid channel. But their Lordships adverting to the repeal of the 297th Section of that Act, observed that "vessels navigating the river were now at liberty to go on whichever side of it they pleased, taking care, of course, to observe the regulations for preventing collisions."

This ruling seems to their Lordships to be by no means so broad as the summary of it which appears in the shorthand writer's note of the Judgment in the Admiralty Court. If, for instance, it were clear upon the evidence, that the two vessels would have gone clear of each other if each had held on upon her own course, then the ruling would not have justified the 'Niord' in crossing the course of the 'Esk,' and so by her own act bringing the two vessels into the category of crossing vessels, since by such an act she would have violated the Regulations for preventing collisions, and would have done that which, it was held in the case of the 'Velocity,' she ought not to have done.

It is probable, however, that the learned Judge of the Admiralty Court only meant to say that in shaping her course up the river, the 'Niord,' under the decision in the case of the 'Velocity,' was generally free to pass from the one side of the mid channel to the other.

Again, something has been said in argument of the negligence of the Master of the 'Esk,' in

leaving his vessel in charge of the licensed waterman Mr. Braine, and of the insufficiency of the look-out, in consequence of the mate quitting the forecastle. As to the first point, it is sufficient to observe that whatever blame may attach to the Master for leaving the steerage and manœuvres of the vessel in charge of the waterman, that circumstance cannot affect the decision of this Appeal, since the owners of the 'Esk' are clearly responsible for the acts and omissions of the waterman as one of the crew. The insufficiency of the outlook, which their Lordships think is established by the evidence, is a very material consideration, if the evidence really affords ground for believing that had there been a proper outlook on board the 'Esk,' the accident would have been avoided.

The real question, as it seems to their Lordships, is this,—was the 'Niord' justified in coming across the river under a port helm? If she was, then if the effect of that manœuvre was to make the vessels crossing vessels within the 14th of the Sailing and Steering Rules, it seems to have been the duty of the 'Esk' to get out of the way; and she failed to do so. On the other hand, if whilst executing that manœuvre the 'Niord' was still in such a position that the two vessels, keeping each its proper course, might have passed each other free port side to port side, it was the duty of the 'Esk,' by porting her helm, to ensure that safe passage, whereas by starboarding she brought about the collision.

Their Lordships do not think it necessary to affirm that these vessels were, at the moment at which they first sighted each other, crossing vessels within the meaning of the Rule; they will assume that the case does not strictly fall within the rule, and will then consider which vessel was in fault, dealing with that question as one of general navigation.

They have had the benefit of consulting their Nautical Assessors, and those gentlemen entirely concur with the Trinity Masters, and with the learned Judge of the Admiralty Court, in the conclusion to which they came,—that the 'Esk' was solely in fault. The 'Esk' unquestionably, in rounding that point, must have been under the port helm for a time. The other vessel had been

hugging the south shore, and would, in the ordinary course of navigation, have gone under a port helm to the other side of the river about the point at which she did go. On the other hand, there seems to be no reason why the 'Esk' coming round the point under a port helm, should not have followed the southward shore, continuing to port her helm.

At all events, whatever may have been her rights or whatever course she might have taken had no other vessel been in the way, it was clearly her duty to observe the 'Niord,' to see whether she was taking that course which persons acquainted with the navigation of the river must have known to be the ordinary course, viz. that of crossing the river, and to conduct her own manœuvres accordingly. She seems to their Lordships not to have done this. Whether in consequence of the insufficiency of the outlook she did not discover early enough what the 'Niord' was doing, or whether from any other cause she failed to take the course which their Lordships, as advised by their Nautical Assessors, conceive was the right course, namely, that of porting her helm,—she must be held responsible for the collision.

Their Lordships do not consider it necessary to go further into the discrepancies in the evidence upon various points which have been commented upon at the Bar. They will, however, mention that in their opinion, the place of the collision cannot have been below the lower creek marked in the chart, and therefore must have taken place shortly after the rounding of the point by the 'Esk.' On the whole case, looking at the question as one of navigation on which four professional persons concur in supporting the Judgment of the Court below, their Lordships feel it to be their duty to advise Her Majesty to dismiss this Appeal with costs.

